

DECISION



24256
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209634

DATE: April 8, 1983

MATTER OF: A-B Emblem

DIGEST:

1. Protester has failed to meet its burden of proving its case where the only evidence on an issue is the protester's unsupported allegation.
2. Protest alleging defects in a solicitation which were apparent from face of the solicitation is untimely since it was not filed prior to bid opening.
3. GAO is not the proper forum for appeal of an agency's refusal to allow examination by the protester of the results of tests conducted on the awardee's bid sample. Protester's recourse is to pursue the disclosure remedies provided by the Freedom of Information Act.
4. Where a solicitation requires the submission of a sample with the bid, the sample relates to the bid's responsiveness, and therefore must be made available for public inspection.

A-B Emblem, a division of Conrad Industries, Inc., protests the award of a contract for embroidered emblems to Lion Brothers Company under invitation for bids (IFB) No. FS-10-82 issued by the U.S. Forest Service. A-B's bases of protest are as follows:

- (1) it was incorrectly found nonresponsive based on a faulty evaluation of its bid sample;
- (2) the Forest Service allowed the awardee to substitute a conforming sample for the nonconforming sample it originally submitted;
- (3) the solicitation's specifications and artwork were impossible to follow and were drafted to restrict competition; and

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(4) the Forest Service erred in not permitting A-B to inspect the awardee's bid sample and the results of the tests conducted on the sample.

The protest is denied in part and dismissed in part.

The solicitation, issued on July 19, 1982 and opened September 3, sought bids on 231,250 patches embroidered with a likeness of the face of "Smokey the Bear" and the words "Think" and "Thanks." It contained a detailed drawing of the proposed patch for the purpose of informing potential bidders of the final product required. The IFB also required all bidders to submit with their bids 12 loomed and finished production samples, and 4 yards of each thread used in the patch. The solicitation specified that the sample patches and thread would be tested by the International Fabricare Institute for compliance with the specifications.

A-B submitted the apparent low bid of \$92,962.50, while the awardee was the next low bidder at a bid price of \$129,060.63. Both bidders' samples were submitted to the Institute for testing. The test results showed that A-B's patch failed to conform to the specifications in a number of areas while the awardee's sample was satisfactory in all respects. Therefore, the Forest Service found A-B's bid to be nonresponsive and awarded the contract to Lion Brothers.

A-B contends that the nonresponsiveness determination, based as it was on the Institute's test results, was improper because the Institute merely evaluated its sample visually and, since the specifications allegedly were vague, they allowed for too much interpretation on the Institute's part.

The Forest Service responds that A-B's contention is without merit because the samples were not subjected solely to a visual evaluation but were tested against the specific criteria contained in the solicitation.

We agree with the agency on this point. The Institute's test results were based, according to the test report, on both "instrumental and perceptual evaluation" of A-B's

sample. Moreover, other than its bare allegation, A-B has not come forward with any evidence to support its contention. Where, as here, a protester's general allegations are not supported by any evidence, the protester has failed to meet its burden of affirmatively proving its case. SAFE Export Corporation, B-205122, March 19, 1982, 82-1 CPD 258.

A-B's contention that the awardee was allowed to substitute samples that conformed to the specification in place of nonconforming samples also is without merit. The agency specifically denies this allegation, and A-B has not provided any tangible evidence to support its position. Id.

A-B next contends that the IFB's specifications were drafted so as to restrict competition, and that the artwork contained in the specifications, which potential bidders were to use in preparing their samples, was impossible to follow. We will not address these contentions because they are untimely raised. They concern alleged defects in the solicitation which were apparent on the face of the solicitation and, therefore, should have been protested prior to bid opening. 4 C.F.R. § 21.2(b)(1) (1982).

Finally, A-B contends that the Forest Service acted improperly in not allowing it to examine the sample submitted by the awardee and in not providing it with the results of the Institute tests conducted on the awardee's sample. The Forest Service has advised A-B that the sample and test results are proprietary to Lion Brothers, and has refused the protester access to them.

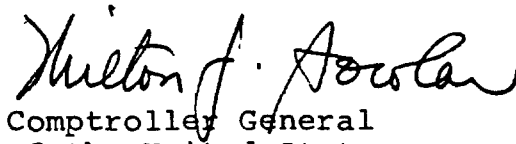
A-B's request for the test results is not a proper subject for a protest to this Office. Rather, A-B's recourse is to pursue its disclosure remedy under the procedures provided by the Freedom of Information Act, 5 U.S.C. § 552 (1976). See Claude E. Atkins Enterprises, Inc., B-205129, June 8, 1982, 82-1 CPD 553.

On the other hand, we believe that it is improper for the Forest Service to refuse A-B the opportunity to examine the awardee's sample. Where, as here, bid samples relate to the responsiveness of the bid, the samples must be made

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available for public inspection. Cherokee Leathergoods, B-205960, August 13, 1982, 82-2 CPD 129. In any event, since A-B's sample was not responsive to the solicitation's specifications and A-B thus is not eligible for award, we cannot say that A-B has been prejudiced by the Forest Service's refusal to permit A-B to examine the sample. This is so because the Forest Service received two other responsive bids in addition to the awardee's bid. Therefore, even if an examination of the awardee's sample had shown that it was in fact nonresponsive, no benefit would have accrued to A-B if the Forest Service had made award to the next lowest responsive bidder.

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States